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SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1962

No. 849

WILLIAM A. MOUSLEY and MAE E. MOUSLEY,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

United States of America,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, William A. Mousley and Mae E. Mousley, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania.

OPINION BELOW

The Per Curiam opinion of the Court of Appeals for the Third Circuit (Judges Kalodner, Hastie and Ganey) was filed on January 22, 1963 and has not been officially reported. (Attached hereto as Exhibit A.)

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 stat. 928 (28 U.S.C. 1254).

QUESTIONS PRESENTED

1. Did not the Court of Appeals err in affirming, without opinion, the conclusion of the District Court that an indictment found some fifteen to nineteen years after the tax years involved charging violations of Section 7201 of the Internal Revenue Code of 1954, was not barred by the Statute of Limitations?

2. Did not the Court of Appeals err in failing to find prejudicial error in the submission of Count II of the indictment to the jury and permitting it to consider whether or not petitioners were guilty of alteration of a document when thereafter the trial court granted a motion for judgment of acquittal as to this count because the evidence failed to show any connection of petitioners therewith?

STATUTE INVOLVED

Internal Revenue Code of 1954 (c. 7360, 68 A. Stat.)

Section 6531:

> "No person shall be prosecuted, tried or punished for any of the various offenses arising under the Internal Revenue laws unless the indictment is found . . . within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years— * * * (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof . . ."

Section 7201:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00 or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 7206:

> "Any person who
>
> (1) willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or * * *

(5) in connection with any compromise . . . or offer of compromise . . . willfully—

(A) conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax

shall be guilty of a felony and, upon conviction thereof shall be fined not more than $5,000.00, or imprisoned not more than three years, or both, together with the costs of prosecution."

SUMMARY STATEMENT OF THE CASE

Petitioners, husband and wife engaged in the real estate business in Delaware County, Pennsylvania, were jointly indicted for violation of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954.

Counts I through IV of the indictment charged petitioners with willfully and knowingly attempting to evade the payment of income taxes assessed against them for the years 1942 through 1946 by filing certain false statements in violation of Section 7201.

Count V of the indictment charged substantially the same offense but in violation of Section 7206(1).

Counts VI through IX of the indictment charged petitioners with filing false and fraudulent income tax returns for the years 1954 through 1957 in violation of Section 7201.

Petitioners moved preliminarily to dismiss Counts I through IV of the indictment under Federal Rule 12 on the ground that prosecution was barred by the statute of limitations. This motion was denied by the court (194 F. Supp. 119) (13a).*

The case was tried to the district judge and a jury for a period of two weeks with a total of 75 witnesses called and 237 exhibits introduced by both the government and the defense.

During the course of the trial it was developed that petitioners had been under intensive investigation by the Internal Revenue Service since 1944, and that on the original deficiency of $35,000.00 which had been asserted for the years 1942 through 1946, they had, at the time of trial, already paid a total of over $109,000.00 including interest and penalties (382a).

The jury convicted both defendants on all counts after having the case a total of four hours.**

On a motion for judgment of acquittal and for a new trial, the district court sustained the motion for judgment of acquittal as to Counts II and V, but denied the motion as to the other counts of the indictment (466a, et seq.).

Petitioner, William Mousley, was sentenced to imprisonment for a period of six months on each of Counts VI through IX, to run concurrently and to pay a fine of $2,000.00 on each of said counts. On Counts I, III and IV,

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* Page references are to appellants' appendix in the Court of Appeals.

** Actually, the jury received the case at approximately noon and immediately recessed for lunch. The verdict of guilty as to both petitioners was returned at 4 p.m.

this petitioner was placed on probation for a period of two years to commence at the expiration of the prison sentence, a condition thereof being that he pay a fine of $2,000.00 on each of said counts within three months after the beginning of the probationary period.

Petitioner, Mae Mousley, was given a suspended sentence, placed on probation for one year and sentenced to pay a fine of $2,000.00 on each of Counts VI through IX within three months and the same fine on Counts I, III and IV within six months.

Petitioners argued in the Court of Appeals, inter alia, that they had been prejudiced by the trial court's submission to the jury of Count II of the indictment and likewise by the lower court's failure to rule that Counts I through IV of the indictment were barred by the statute of limitations.

The judgment and sentence of the District Court were affirmed by the Court of Appeals for the Third Circuit, in a Per Curiam opinion stating merely that "Upon review of the record we find no error."

The present petition seeks to review the action of the Court of Appeals for the Third Circuit.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT IN SUPPORT THEREOF

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1. A ruling on the applicability of the statute of limitations was expressly reserved by this Court in the case of *United States v. Beacon Brass Co., Inc.*, 344 U.S. 43, 97 L.

ed. 61 (1952), and since then there has been no appellate court ruling on the point. The district court decisions are in conflict: *United States v. Sclafani*, 126 F. Supp. 654 (E.D.N.Y., 1954); *United States v. Bridell*, 58 CR. 475 (N. D.Ill., 1959).*

2. The decision of the Court of Appeals for the Third Circuit is in conflict not only with its own decisions in cases involving a construction of Criminal Rule 52, but is also in conflict with the decisions of other Courts of Appeals.

3. The action of the court below in affirming, without opinion, in an admittedly long and difficult tax case (469a) involving fundamental legal problems as well as the liberty of one of the petitioners should require a careful and studied examination by this Court.

A prison sentence has been imposed upon one of petitioners in a tax case in which there is grave doubt as to the propriety of his conviction. It was argued in the court below that it was impossible for the jury to have given the petitioners the effective consideration to which they were entitled. We now argue that the Court of Appeals has compounded the error by a curt affirmance** of the lower court's action without giving the petitioners, or at least the one who is to be incarcerated, the benefit of an opinion on the legal points raised.

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* The *Bridell* case is unreported; however, a certified copy of the transcript of the proceedings is attached hereto as Exhibit B. It had previously been furnished to the trial judge prior to argument on the motion to dismiss.

** The Per Curiam opinion was handed down two weeks after argument.

Petitioners urge this Court to hear argument on two legal propositions presented to the court below: (a) the applicability of the statute of limitations to offenses committed under Section 7201 of the Internal Revenue Code of 1954 and (b) prejudice under Rule 52 of the Federal Rules of Criminal Procedure.

(a)

Petitioners were indicted on January 24, 1961 for willfully and knowingly attempting to evade the payment of income taxes assessed against them for the years *1942* through *1946* by making false statements in connection with an offer in compromise, such false statements commencing on January 26, 1955 and continuing through January 23, 1957.

It is obvious that the six year statute had run *qua* the filing of returns for those years; indeed, the period would have expired in 1953. Thus, the false statements which form the basis for this indictment (the first four counts) were alleged to have been made well over a year and a half beyond the end of the statutory period.*

The position of the government is that since Section 7201 refers to evading the "payment of tax" *in any manner*, the statute of limitations does not apply to the situation now before the Court. This view has been vigorously criticized: *Bilter: The Journal of Taxation*, Volume 12 (November 1960, page 304); *Crowley: The Journal of*

* It is to be noted that in both *Beacon Brass* and *Sclafani*, the alleged false statements had been made prior to the running of the statute, although the indictments were found thereafter.

Taxation, Volume 11 (November 1959, page 302). Our point is, however, that in *Beacon Brass* this Court expressly did not consider the question and thus it remained possible that while false statements* might constitute evasion, prosecution must be brought within six years of filing on the theory that evasion was but one offense, which was then completed.

The court in *Sclafani* apparently assumed that this Court had ruled on the point. The court in *Bridell* refused to follow the *Sclafani* principle and quashed an indictment found more than six years after the filing of the return. Balter concludes in the article referred to:

> "The case law now stands in a somewhat unsatisfactory state: Beacon Brass was erroneously extended in the district court decision in Sclafani and the appeal, upholding it, turned on other issues. The Bridell case, correctly refusing to follow Sclafani, has not been brought to the appeal court."

We ask this Court to resolve the confusion for the benefit of all practitioners generally and, specifically, to make certain that if the husband-petitioner must be jailed, every safeguard and consideration has been accorded to him.

(b)

As to prejudice in the trial court, the facts are that Count II of the indictment charged petitioners with sub-

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* There is no logical reason for the government to insist on a prosecution under Section 7201 when it has available Section 7206; cf. *Beacon Brass*, at page 45.

mitting a fraudulent application for discharge of a lien and the government presented evidence that the date on a certain agreement of sale had been altered. The government introduced the testimony of an F.B.I. handwriting expert who testified that the date on the document in question had been altered. Petitioners denied any knowledge of the alteration and there was no evidence linking them thereto.

The trial judge charged the jury, inter alia, as follows (456a-457a):

> "The evidence that I recall, as I say, is that the Government did prove through a handwriting expert that that day, the 12th had been changed, and the implication is that it was changed with some ulterior motive. *The only ulterior motive would have been to avoid payment of taxes due the United States.*" (Emphasis supplied.)

After the jury had convicted petitioners on this count as well as all the others, the trial judge, on motion for judgment of acquittal, granted same as to this count (as well as Count V).

This Court in *Kotteakos v. United States*, 328 U.S. 750, 90 L. ed. 1557 (1945), crystallized the law and made abundantly clear that such a conviction as this should not stand. The Third Circuit, in *United States v. Long*, 257 F. 2d 340 (1958), followed the same rule saying (page 342):

> "We are satisfied that the questioned evidence was not significantly probative of any matter in issue. *Yet it was found to be prejudicial in introducing the suggestion of some additional misconduct in the case*

> *and into the minds of the jury.* This conclusion of minimal probative value combined with a potential of substantial prejudice leads us to rule that it was reversible error. (Emphasis supplied.)

Likewise, the Seventh Circuit, in *United States v. Grady*, 185 F. 2d 273 (1950), said (page 275):

> "True, it is possible that the defendant suffered no harm by reason of the affidavit going to the jury . . . On the other hand it could and it might have been used effectively in persuading jurors otherwise doubtful or opposed to conviction to agree to a verdict favorable to the government. And it is sufficient to require a reversal if, in our judgment, the error might have operated to the substantial injury of the defendant."

Had the trial court sustained petitioners' original motion to dismiss Count II or their renewed motion at the close of the case, the jury would not have had before it this devastating evidence. Can it be said with certainty, considering the "total setting and proceedings had" (*Homan v. United States*, 279 F. 2d 767, 771 (CA 8, 1960)), that this type of evidence did not have any influencing effect upon the jury?

Petitioners urge this Court to hear argument to insure that husband-petitioner's deprivation of liberty is proper under all the circumstances present.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM JAY LEON

LESTER J. SCHAFFER

Attorneys for Petitioners

EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 13,969; 13,970

United States of America

v.

William A. Mousley,
Mae E. Mousley,
Appellants

Appeals From the United States District Court for the Eastern District of Pennsylvania

Argued January 8, 1963
Before Kalodner, Hastie and Ganey, *Circuit Judges*

OPINION OF THE COURT

(Filed January 22, 1963)

Per Curiam:

Upon review of the record we find no error. The judgment of sentence dated February 26, 1962 will be affirmed.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

No. 58 CR 475

United States of America
v.
Albert M. Bridell,
Defendant

Transcript of proceedings had at the hearing of the above-entitled cause, before the Hon. William J. Campbell, one of the Judges of said Court, in his courtroom, U. S. Courthouse, Chicago, Illinois, on Thursday, November 20, 1958, at 10:00 o'clock a.m.

Present:

Mr. A. F. Manion, Assistant U. S. Attorney, on behalf of the Government;

Mr. George D. Crowley, on behalf of the defendant.

THE CLERK: No. 58 CR 475, United States v. Albert M. Bridell, motion to dismiss.

On March 14, 1952, Albert M. Bridell, defendant herein, together with his wife, Emlee B. Bridell, filed a joint income tax return for the calendar year 1951 in which he stated that his salaries, wages and taxable compensation received during the calendar year 1951 from the American Carbon Paper Corporation amounted to $6,008. On June 13, 1952, the defendant, as President of the American Carbon Paper Corporation, caused to be filed with the Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, a corporate income tax return on behalf of such corporation for the calendar year 1951, in which return it was stated that the total income, exclusive of reimbursed expenses, received by the defendant and his wife from such corporation during the year 1951 amount to $6,000.

On June 13, 1958, a complaint was filed with the United States Commissioner. On July 31, 1958, the May 1958 Federal Grand Jury returned a two count indictment against Albert M. Bridell. Count I of the indictment states in substance that:

> ". . . Albert M. Bridell . . . who had on March 14, 1952 filed . . . a joint income tax return on behalf of himself and his wife . . . did willfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him and his wife to the United States of America for said calendar year 1951 by filing and causing to be filed for the purpose of concealing additional unreported income received by the said Albert M. Bridell and his wife Emlee B. Bridell, during said calendar year 1951, a false corporation income tax return on behalf of the American Carbon Paper Corporation for said cal-

endar year 1951 . . . in violation of Section 145(b), Internal Revenue Code of 1939, 26 U.S.C., Section 145(b)."

So much for the charge in the first count of the indictment.

Defendant has made a motion to dismiss this count of the indictment. Count II is not in question. We have only Count I before the Court.

Defendant has made a motion to dismiss this Count I of the indictment on the grounds that it was not found within six years next after the alleged offenses were committed; or that it is duplicitous.

As to the first ground put forth by the defendant which I think is the only ground worthy of consideration, I do not find it duplicitous. As to the first ground put forth by the defendant in support of his motion to dismiss, the basic limitation statute, Title 26 U.S.C., Sec. 3748 provides for a six-year period of limitation in regard to the prosecution for offenses of this nature. It is not questioned that the complaint having been instituted on June 13, 1958 operated to toll the statute of limitations until the discharge of the grand jury at its next session. However, it is the contention of the defendant that the offense charged in the indictment was completed on March 14, 1952, by the filing of a fraudulent income tax return and that, therefore, the complaint instituted before the Commissioner on June 13, 1958, was not within the period limited by the statute of limitations and consequently the indictment returned on July 31, 1958 was not timely.

It is the contention of the Government that the offense charged is separate from the filing of the fraudu-

lent income tax return, namely, the attempt to evade and defeat the taxes owing by the defendant by the filing and causing to be filed of a false corporation income tax return on behalf of the American Carbon Paper Corporation with the purpose of concealing additional unreported income of the defendant. Since this act occurred on June 13, 1952, the complaint instituted on June 13, 1958 would be within the period limited by the statute of limitations and consequently the indictment returned on July 31, 1958 would be timely.

A plain reading of the indictment clearly shows that the crime charged in Count I of the indictment is the attempt to evade and defeat the taxes owing by the defendant through the filing and causing to be filed of a false corporation income tax return on behalf of the American Carbon Paper Corporation with the purpose of concealing unreported income of the defendant.

Since this act took place on June 13, 1952, the question presented is whether this act is an offense separate from the filing of the fraudulent income tax return on March 14, 1952 under Title 26 U.S.C.

Section 145(b) which is so far as material here provides:

> "Any person . . . who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall . . . be guilty of a felony . . ."

Defendant contends that the corporate return on June 13, 1952 was not a separate offense under Sec. 145(b) but was part and parcel of any offense which may have been committed by the defendant upon the filing of his in-

dividual tax return on March 14, 1952. In support of this contention, defendant cites *U. S. v. Johnson*, 319 U.S. 503, 515; *Inholte v. U. S.*, 226 F. 2d 585; *Cave v. U. S.*, 159 F. 2d 464; *Guzik v. U. S.*, 54 F. 2d 618.

The Government contends that the filing of the corporate return was a separate offense under Section 145(b) and cites *U. S. vs. Beacon Brass, Inc.*, 344 U.S. 43 and *U. S. v. Sclafani*, 126 F. Supp. 654. The *Beacon* case involved an indictment returned against Beacon Brass Co. and its president on September 14, 1951, charging that both the defendants had attempted to evade taxes owing by making fraudulent statements to Treasury representatives on October 24, 1945, "for the purpose of concealing additional unreported income in violation of Section 145 (b)."

The unreported income apparently should have been included in the corporate return which was filed in January, 1945, though no reference was made to such in the indictment.

The District Court dismissed the indictment on the grounds that it failed to charge an offense under Title 26 U.S.C. Section 145(b) because such making of false statements could be punished only by Sec. 35(a) of the Criminal Code, since that section dealt specifically with false statements and the three year limitation of that statute had expired as to statements made in October, 1945. The Supreme Court in reversing the District Court made some statements which to me appear confusing. At Page 45, the Court states:

> "The purpose to evade taxes is crucial under this section. The language of Sec. 145(b) which outlaws

willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income."

Then at Pages 46 and 47, in the same opinion, the same Court states:

"The appellees contend that the acts charged constitute only one crime of tax evasion which was complete when the allegedly false tax return was filed. On the basis of this contention, appellees seek to sustain the decision below on the grounds that the six-year statute of limitations had run, and that the dismissal of the first indictment is *res adjudicata* and a bar to the second indictment for the same offense. We do not consider these questions because our jurisdiction on this appeal is limited to review of the District Court's construction of the statute in the light of the facts alleged in the indictment."

Then they cite *United States v. Borden Co.*, 308 U.S. 188.

Thus, the Supreme Court is stating on the one hand that false statements to Treasury Agents are offenses, under Sec. 145(b) and then stating that they are not deciding whether or not such statements are part and parcel of the one crime of tax evasion which was complete when the allegedly false tax return was filed.

In the *Sclafani* case, Counts 4 and 5 of information charged that on or about and between June 21, 1950, and on January 12, 1951, the defendant, a married man willfully and knowingly attempted to defeat and evade part of the income taxes due from him and his wife for the years 1945 and 1946 respectively, by making, filing and

causing to be filed with representatives of the United States Treasury Department certain false and fraudulent statements for the purpose of concealing additional unreported income. The returns for the years in question were filed in March 1946 and March 1947, respectively, more than six years prior to the filing of the information, the limitation fixed by Title 26 U.S.C. Sec. 3748(a), subdivision 2.

The Court denied the defendant's motion to dismiss stating at page 656:

> "In support of his motion the defendant cites the cases of *Guzik v. United States*, 54 F. 2d. 618, *Care v. United States*, 159 F. 2d 464, and *United States v. Ehrlich*, 104 F. Supp. 223, contending that those cases are controlling since the crimes in said counts alleged were completed in March, 1946, and March, 1947. It is correct to say that prosecution for the alleged crime of attempted evasion of taxes *by the filing of false tax returns*, were outlawed in 1954, but it was possible for the defendant to violate the statute involved in more than one way and on more than one occasion, and that is precisely what the Government accuses the defendant of doing. Counts 4 and 5 of the instant information charge that the defendant attempted to evade the payment of income taxes for the years 1945 and 1946, respectively, by filing or causing to be filed with representatives of the United States Treasury Department between June 21, 1950 and January 12, 1951, certain false and fraudulent statements for the purpose of concealing additional unreported net income for the years therein mentioned. The case of *United States v. Beacon Brass Co., Inc.*, 344 U.S. 43

appears to be in point. The pertinent facts in that case are substantially similar to those in the instant case. . . ."

Therefore, the *Beacon* case and *Sclafani* case relied upon by the Government here do not decide whether or not the defendant's act is, in the case at bar, a part and parcel of the offense of March 14, 1952 which was the filing of a fraudulent income tax return since the *Beacon* case expressly states that it is not deciding that question and the *Sclafani* case relied on the *Beacon* case as deciding that in a case of this nature two separate offenses are possible.

In my opinion the answer to this problem lies in the analysis of Sec. 145(b), the section alleged to have been violated.

In *Spies v. United States*, 317 U.S. 492, the Supreme Court in discussing the difference between Section 145(a) and Sec. 145(b) made the following statement at Pages 498, 499:

> "The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt'. The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeeds in evading

the tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest offenses against the revenues, Congress intended some willful commission in addition to the willful additions that make up the list of misdemeanors. *Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.*"

It is clear to me from this language, and it has been held by many cases in addition to those cited by defendant, that it is the *same act* which is aggravated to the degree of a felony by such conduct which amounts to a "willful and positive attempt to evade tax in any manner."

I cite *U. S. v. Hoover*, 233 F. 2d 870; *Elwert v. U. S.*, 231 F. 2d 928; *Hayes v. U. S.*, 227 F. 2d 540; *Canton v. U. S.*, 226 F. 2d 313; *U. S. v. Bardes*, 224 F. 2d 255; *U. S. v. Smith*, 206 F. 2d 905.

The act which constitutes the offense in the case at bar was the filing by the defendant of a joint income tax return on March 14, 1952 which was aggravated by the subsequent filing by the defendant as a corporate officer of a corporate income tax return on June 13, 1952.

Therefore, the act of the defendant in filing a corporate return on June 13, 1952 is not an offense separate from the offense completed on March 14, 1952 by the filing of his fraudulent income tax return. Therefore, Count I of the indictment, which charges the defendant with a violation of Sec. 145(b) with reference to his own personal income tax return by such an act must fail.

It is illogical to presume that the true nature of the offense as set out in 145(b) is contained in the defendant's act of filing a fraudulent corporate return since the evasion, per se, took place when the defendant filed his personal return. Such a construction as urged here by the Government would enable the Government to continue the statute of limitations indefinitely by using any false statement in regard to a past tax evasion as a reviving of the statute of limitations.

The motion to dismiss Count I of the indictment is for the reasons stated granted. And the same is dismissed.

* * * * * * * * *

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

No. 58 CR 475

United States of America,

v.

Albert M. Bridell,

Defendant.

CERTIFICATE

I hereby certify that the above and foregoing transcript, Pages Nos. 1 to 16 inclusive, is a true and accurate transcript of the original shorthand notes taken upon the hearing in the above-entitled cause, on Thursday, November 20, 1958.

Paul A. Ruhe
Official Court Reporter,
United States District Court.

Dated: May 4, 1961.